

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY  
CIVIL ACTION NO. 15-3579 (FLW)

1

NATIONAL FREIGHT, INC.,	:	TRANSCRIPT OF SHOW
Plaintiff,	:	CAUSE HEARING FOR
	:	PRELIMINARY
v.	:	INJUNCTION
	:	
ANDREW P.SIDAMON-ERISTOFF	:	
et al.,	:	JULY 29, 2015
Defendants	:	
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CLARKSON S. FISHER UNITED STATES COURTHOUSE  
402 EAST STATE STREET, TRENTON, NJ 08608

B E F O R E: THE HONORABLE FREDA L. WOLFSON, USDJ

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**C E R T I F I C A T E**

PURSUANT TO TITLE 28, U.S.C., SECTION 753, THE  
FOLLOWING TRANSCRIPT IS CERTIFIED TO BE AN ACCURATE  
TRANSCRIPTION OF MY STENOGRAPHIC NOTES IN THE  
ABOVE-ENTITLED MATTER.

S/Vincent Russoniello  
VINCENT RUSSONIELLO, CCR  
OFFICIAL U.S. COURT REPORTER

1 (In open court.)

2 THE CLERK: All rise.

3 THE COURT: Thank you.

4 May I have the appearances, please. For the  
5 plaintiff.

6 MS. LAVERY: Good morning, your Honor.

7 Kellie Lavery from Reed Smith. I'm here with  
8 my colleague Diane Green-Kelly who will be arguing  
9 this morning and our client Scott Brucker.

10 MR. PEITZ: Good morning, your Honor.

11 Jonathan B. Peitz, Deputy Attorney General, on  
12 behalf of the defendants.

13 And just so your Honor is aware, in the  
14 courtroom today is Bob Davidson who is one of the  
15 defendants. He is sitting in the first row.

16 THE COURT: Thank you. You can feel free, if  
17 he would like to sit with you, if you want him to sit  
18 with you.

19 MR. PEITZ: I think he's okay, your Honor.

20 THE COURT: Okay. Have a seat everyone.  
21 Thank you.

22 Let me begin. Obviously, there are several  
23 bases on which the plaintiff has moved to enjoin the  
24 State from escheating this property under the  
25 Unclaimed Property Act.

1 First of all, let me start with, one of the  
2 arguments that the State has made with regard to  
3 sovereign immunity is only as to state law claims.  
4 Correct?

5 MR. PEITZ: Yes, your Honor.

6 THE COURT: And I don't think you've really  
7 responded to the state law claims.

8 MS. GREEN-KELLY: No.

9 THE COURT: Only sovereign immunity of course  
10 doesn't apply to the injunctive relief you're arguing  
11 as to the constitutional claims.

12 MS. GREEN-KELLY: Correct. And in terms of  
13 the dollars, all of the dollars are subsumed in our  
14 preemption and constitutional law claims. So the  
15 injunctive relief that we are requesting with or  
16 without the state law claim is still -- would cover  
17 the whole remainder of the assessment.

18 THE COURT: I understand what your argument  
19 is. We are not addressing state law claims today.  
20 Right?

21 MS. GREEN-KELLY: Correct.

22 MR. PEITZ: Yes, your Honor.

23 THE COURT: All right.

24 So I'll deal with the priority arguments under  
25 the Texas line of cases last because frankly that is

1 the one that has the traction to it. I'm going to  
2 start instead with the other arguments that have been  
3 made that have taken up a fair amount of the briefing  
4 with regard to federal preemption under the Interstate  
5 Commerce Commission Termination Act known as the ICCA  
6 and the commerce clause arguments that the plaintiff  
7 has made in this case.

8 Now, first thing is -- is it Ms. Green-Kelly.

9 MS. GREEN-KELLY: Yes.

10 THE COURT: I have to say that I was a little  
11 surprised by the fact that many of the arguments you  
12 are making in this connection as to why you believe  
13 there would be preemption which are based upon certain  
14 factual representations that appear in your verified  
15 complaint, and it is a verified complaint, but those  
16 are conclusory allegations, and this is your burden on  
17 a preliminary injunction to satisfy the Court,  
18 statements such as, it is industry practice, without  
19 any backup for it by certification or reference is not  
20 going to do it.

21 Statements such as, many of our or most of our  
22 contracts have an 18 to 24-month period by which  
23 requests for refunds must be made, having a simple  
24 statement in a verified complaint as to an allegation  
25 as to that doesn't do it without providing me with any

1 contracts that actually show me language, and that's  
2 this case, or telling me, in fact, how many contracts  
3 we are talking about out of your total contracts and  
4 how that could impact therefore rates.

5 So I have to say, I was a bit surprised by the  
6 proofs that have been provided. It's a different  
7 argument on the priority arguments, but it's absent.

8 MS. GREEN-KELLY: Your Honor, may I respond?

9 THE COURT: Please.

10 MS. GREEN-KELLY: Well, the defendants have  
11 attached to the affidavit of Mr. Shah as Exhibit E a  
12 copy of the report, the audit report, that supports  
13 the credits and in that report they describe what  
14 these are.

15 The bottom line is this, is they are all  
16 credits that arise from customer payments for the  
17 purchase of transportation and the nature of those  
18 credits is what is at issue.

19 THE COURT: Simply saying that isn't going to  
20 do it for me. On a likelihood of success under the  
21 ICCA, I will tell you, I'm not buying it. I've looked  
22 at all of the cases. Simply saying the fact they  
23 happen to be credits doesn't show me why it would  
24 preempt it under the statute which talks about, "a  
25 state may not enact or enforce a law, regulation, or

1 other provision having the force and effect of law  
2 related to a price, route, or service of any motor  
3 carrier with respect to the transportation of  
4 property."

5 I've looked at all of the cases. I know you  
6 relied on the Rowe case and a couple of those others.  
7 They are not convincing me as to why this falls within  
8 the ICCA provision.

9 The FAAAA contains the words "with respect to  
10 the transportation of property." It certainly limits  
11 the scope of preemption. This is dealing with -- I  
12 know you are saying it relates to the services. But  
13 these are after the fact credits.

14 Looking at the Dan's City case -- and I can go  
15 through all the cases with you. But I'm simply  
16 telling you, I understand what you are claiming that  
17 they are. It's a little bit confusing how it all  
18 comes about frankly. In some of the cases you may not  
19 match up with an invoice because they pay before.  
20 Whatever that means. It's a little odd to me that you  
21 can't match up a service with a payment being made  
22 regardless of the invoice, but that's another thing.  
23 That's for another day perhaps.

24 But all of these things, the fact that if  
25 these are things that belong to the creditor, they are

1     refunds. They are not yours. You are saying it's all  
2     built into the rates, et cetera. I really don't have  
3     anything to give me that conclusion. What the case  
4     law talks about is looking to the delivery of the  
5     services or the setting of rates.

6             I frankly have nothing that would indicate to  
7     me that those kinds of situations do affect your  
8     rates. Like I said, a mere allegation in a complaint,  
9     even though verified in a conclusory fashion, is not  
10    going to do it.

11            I have found in some of these cases certainly  
12    things you would think would be much closer to it and  
13    nonetheless they have found that they are not  
14    preempted, down to the Dilts case which the Supreme  
15    Court denied cert on now in 2015 out of the Ninth  
16    Circuit where they talked about meal and rest breaks  
17    and how that could factor into how prices are set, the  
18    routes that they use, or the services they provide.

19            The Ninth Circuit said that it does not meet  
20    the "related to" test just because it shifts  
21    incentives and makes it more costly for motor carriers  
22    to choose some routes or services relative to others,  
23    and they were not preempted. The Supreme Court denied  
24    cert.

25            I can go through a number of others where your

1 analysis just doesn't on a likelihood of success fly.  
2 But more importantly, as I've said, I can't tell you  
3 at the end of the day if this goes through discovery  
4 and where we are if you could be successful on a  
5 likelihood of success and what you've provided me on  
6 this record, absolutely not.

7 MS. GREEN-KELLY: Your Honor, may I respond?

8 THE COURT: Sure.

9 MS. GREEN-KELLY: As I'll point out again, the  
10 audit report for the credits provide the facts. These  
11 are the findings that the State actually --

12 THE COURT: Which exhibit are you referencing?

13 MS. GREEN-KELLY: It's Exhibit E to the Shah  
14 declaration. It's docket number 15-6.

15 THE COURT: Which page would you like me to  
16 look at?

17 MS. GREEN-KELLY: Look at page 10 and it  
18 starts in the long paragraph at the bottom.

19 So they are talking about the P credits, which  
20 are the ones that are at issue here, and they are  
21 saying that the P credits are unresolved items --  
22 these are arising from accounts receivable, from  
23 customer payments.

24 If you turn onto again carrying over to page  
25 11, the credit is reclassified as a refund liability

1 and moved to an account. These are potential refunds  
2 if they, in fact, are owed to customers who purchase  
3 transportation services which is what NFI offers.  
4 That's what they offer. They sell transportation  
5 services.

6 So in the Statland case, for example, the  
7 Seventh Circuit said that if it's refunds, it relates  
8 to rates. Here is the thing. The ICCA deregulates.  
9 It's different when you have --

10 THE COURT: The Statland case that you are  
11 referencing, those dealt with canceled ticket refunds,  
12 and they said that they relate to rates, and they said  
13 under the ADA states cannot regulate -- they are the  
14 airlines, American Airlines -- ticket refund practices  
15 by common law or by statute.

16 Indeed, in the Statland case, the Airline  
17 Deregulation Act, the Supreme Court noted, and has  
18 been noted elsewhere, is broader than the ICCA, in  
19 that case we were dealing with breach of fiduciary  
20 duty, violation of consumer fraud, et cetera. I do  
21 not find that that case is going to help you here, nor  
22 do I find it convincing vis-à-vis the other cases.

23 It's your obligation, by the way, to show that  
24 issuing these credits really is related ultimately to  
25 your price setting. You haven't done it.

1           What I've really told you today -- and I'm not  
2     telling you, would you ever be able to convince me --  
3     today is a preliminary injunction hearing. It's a  
4     likelihood of success hearing. You have not given me  
5     anything, anything to back this up other than the bald  
6     allegation that it does affect it. I don't have  
7     analysis from you. I don't have underlying  
8     documentation. I don't see how this has been done.

9           All the comments you make -- and this applies  
10    to the Commerce Act clauses, as well, but there are  
11    other arguments on the Commerce Act -- talk about  
12    industry standards, any of these things, you haven't  
13    told me about another company doing this.

14           I don't know why it appears the way it is. As  
15    I said, I don't know what you could produce in the  
16    future, what you might do, but on this record it  
17    doesn't do it.

18           MS. GREEN-KELLY: Your Honor, a lot of this  
19    goes to the fact that there is a derivative right  
20    here. The State doesn't have a direct right. They  
21    only have the right to take custody of what the  
22    customer has. The audit report identifies that these  
23    are customer amounts. These are amounts that  
24    customers paid for transportation of services. That's  
25    the nature of what it is.

1           The State is now trying to essentially say, we  
2       would like to take those refunds, potential refunds,  
3       and give it back to NFI customers in violation of what  
4       may be NFI's policies.

5           THE COURT: Let me stop you right there.  
6       That's the word you just said. That may well be in  
7       violation of NFI's policy. Again, putting the words  
8       may well be or what occurred, you haven't given me a  
9       record to make that determination.

10          What I'm trying to tell you is, and it's clear  
11       we are having a disconnect here, maybe the things that  
12       you are saying could carry some weight, but I have  
13       some questions about that, but factually might carry  
14       some weight on some other argument, but you haven't  
15       given me that. You are arguing here but without the  
16       proof behind it. It is your burden on a preliminary  
17       injunction hearing. It's a drastic remedy.

18          MS. GREEN-KELLY: The complaint is verified.  
19       The facts in the complaint are verified by Gary  
20       Nichols.

21          THE COURT: I've said this to you. That's it.  
22       They are bald allegations. I've gone to your verified  
23       complaint. They are verified. Let's go through it  
24       right now. With nothing, again, backing them up and I  
25       do not have to accept bald conclusions of factual

1 statements that are not backed up, and I've gone back  
2 to the way they have been stated and that's all they  
3 are.

4 For instance, I know you've cited to paragraph  
5 70: "If the amounts of customer credits are subject  
6 to escheat generally, there will be a significant  
7 impact on carrier rates because of lost revenue, as  
8 well as increased cost of compliance with more than 50  
9 state escheat laws, including administration costs,  
10 additional personnel and accounting expenses to track  
11 credits and conduct extensive additional due diligence  
12 to resolve discrepancies involving thousands of  
13 transactions."

14 Last sentence of that paragraph: "The loss of  
15 revenue and increased costs likely will result in  
16 increased prices."

17 There is no meat to that allegation. It has  
18 not provided me any facts, any documents, any  
19 calculations as to what the administration costs would  
20 be, what kind of personnel would be required, what  
21 additionally would be required, what kind of  
22 accounting would have to be done, what is different,  
23 what is this supposedly additional due diligence to  
24 resolve discrepancies, none of that.

25 And then to say will likely result in

1 increased costs, again, this may be one of my first  
2 cases for a preliminary injunction where I have no  
3 certifications from the parties seeking the injunctive  
4 relief, certifications that give further explanation  
5 and attach the backup documentation and the  
6 explanation. I don't have it here.

7 So what I'm saying is, yes, I understand he  
8 makes it. Those are conclusions. They are essential  
9 arguments to me because they are in such a general,  
10 general fashion.

11 Similarly, paragraph 69, that talks about  
12 "...significant additional administrative costs  
13 related to compliance, including sending due diligence  
14 letters by certified mail with respect to hundreds of  
15 credits," well, that doesn't tell me really what it  
16 would cost, how many customers we are talking about  
17 normally would be related to that, and that once you  
18 kind of set up a system really what the additional  
19 administrative burdens are, and the fact that there  
20 may be some isn't the issue.

21 If you remember the American Express case --  
22 we'll get to that because you'll really love that one  
23 for the last argument on priority -- in there, in  
24 fact, they demanded that at the point of sale there be  
25 additional information taken which obviously American

1 Express argued, or the card purchaser said, it's an  
2 additional burden, but we said too bad, so sad on  
3 that. That's what happens sometimes, additional  
4 burdens. There may be costs. So your general  
5 allegations without support aren't going to do it.

6 MS. GREEN-KELLY: Your Honor, the preemption  
7 argument for the ICCA is about a federal deregulation,  
8 and the Supreme Court in Morales has said that as long  
9 as it doesn't have -- if it's anything more than just  
10 tenuous, it's preempted, and here what's happening is  
11 the State is regulating them. It's a deregulation  
12 federal statute.

13 THE COURT: I think the Supreme Court cases  
14 and other cases do a little more than what you say,  
15 and I think you are reading that pretty broadly  
16 because then we go to what are the different  
17 situations where this has occurred.

18 MS. GREEN-KELLY: Well, for example, in Rowe  
19 v. New Jersey Motor Transport Association that was a  
20 statute that wasn't even regulating motor vehicles.  
21 It was regulating tobacco retailers and telling them  
22 what things they had to do to deliver and --

23 THE COURT: No, no. There it says -- what you  
24 talk about there, though, is it did affect how the  
25 delivery would occur.

1 MS. GREEN-KELLY: But it was an indirect --  
2 the statute itself was not regulating motor carriers.  
3 It was regulating tobacco retailers, and the effect of  
4 it was that the motor carrier was going to have to  
5 confirm who the delivery was made to and to make sure  
6 that they were 21-year old to receive tobacco.

7 It wasn't the statute that was even directed  
8 at motor carriers, and yet the Supreme Court held that  
9 there was preemption because it had the indirect  
10 effect of requiring the motor carrier to do something  
11 they might not want to do.

12 This is the same situation. This is an  
13 indirect effect, and under Morales and under Rowe an  
14 indirect effect is a not, an indirect effect on how  
15 NFI handles credits from customers. It really doesn't  
16 matter how many dollars they are going to spend. For  
17 the commerce clause claim maybe. For the preemption  
18 argument the amount of money, the exact amount of  
19 money that it is going to cost is not relevant because  
20 what's relevant is that it has an indirect effect on  
21 rates.

22 THE COURT: You haven't convinced me it has an  
23 effect on rates. That's part of the problem. If you  
24 look at the Dan's City case, which is a Supreme Court  
25 2013 case which talks about, the law must concern a

1 motor carrier's transportation of property, and of  
2 course defines transportation as services relating to  
3 the movement of property, and there what occurred was  
4 obviously the car once it had been towed was disposed  
5 of. And it says that that's not sufficiently  
6 connected to a motor carriers's service with respect  
7 to the transportation of property.

8 Obviously, here, it doesn't affect  
9 transportation of property. You are suggesting it  
10 affect rates. And what I'm telling you is, you have  
11 not adequately represented to me on this record that  
12 it does affect rates.

13 MS. GREEN-KELLY: Because it affects refund  
14 policies.

15 THE COURT: Saying that statement alone  
16 doesn't do it. I'm sorry. I reject your argument.  
17 It has to have some sort of significant economic  
18 effect and affecting rates, and you have not convinced  
19 me that it does.

20 Similarly, if you look at the Seventh Circuit  
21 case of Nationwide Freight Systems where that was  
22 indeed a licensing statute, they said that the  
23 economic effect, if there was one, would be  
24 insignificant.

25 I cannot on this record -- merely saying that

1 it can have an effect, that's not what the law  
2 requires, and you have not on this record shown me  
3 that it would have more than an insignificant effect.  
4 That's why I have to reject your argument as well.

5 On a likelihood of success, that's where we  
6 are, you haven't done it. There may be some arguments  
7 you could make. There may be some arguments you could  
8 make even on what your contracts are. I don't even  
9 have the contracts to look at them.

10 Next, turning to your commerce clause  
11 argument, I don't think you've made any showing of an  
12 effect on interstate commerce, nor could I find on  
13 this record you've shown an incidental effect on  
14 interstate customers. So I'm not accepting the  
15 commerce argument.

16 I do want to now turn to the Texas priority  
17 arguments. It's your turn, Mr. Peitz, because you are  
18 on the ropes on this one.

19 MR. PEITZ: Good morning, your Honor.

20 THE COURT: Good morning.

21 So all we are talking about here is, because  
22 obviously I've determined that you haven't made a  
23 showing with regard to the ICCA or the commerce  
24 clause, any of the in-state escheat is not going to be  
25 the issues on the Texas priority.

1 MR. PEITZ: Yes, your Honor.

2 THE COURT: What we are talking about is  
3 out-of-state creditors. Now, the question I have here  
4 is, what I understood is, virtually all of them have  
5 last known addresses. Is that correct?

6 MS. GREEN-KELLY: Yes.

7 THE COURT: Okay.

8 MR. PEITZ: With respect to whether the  
9 records were available, they had the last known  
10 addresses, there was a large estimated period where it  
11 was presumed there were no addresses. So all the  
12 amounts were taken for New Jersey.

13 THE COURT: We'll break this up. For which  
14 last known addresses are known. We also know every  
15 state has an escheat statute now. Correct?

16 MR. PEITZ: Yes, your Honor.

17 THE COURT: Okay. I don't know how you get  
18 past the first priority rule.

19 MR. PEITZ: Well, your Honor, the State is  
20 taking under the second priority.

21 THE COURT: I know you are. You don't get to  
22 the second is what I'm saying. How do you even get to  
23 the second when under the first priority rule you have  
24 a last known address? That's supposed to be the end  
25 of it, and the last known address, and that there is

1 an escheat statute.

2 As you know, as the Third Circuit said in the  
3 American Express case, the right to escheat is also  
4 the right to decide not to escheat a particular kind  
5 of property. So to the extent that some of these  
6 states either have dormancy periods that are  
7 different, have periods that kind of toll the escheat  
8 while they are still in the business-to-business  
9 relationship or other things, or simply choose not to  
10 act, the fact that they have an escheat statute and  
11 the last known address is known, that's the end of the  
12 inquiry. You stop at Step 1. You never go to Step 2.

13 MR. PEITZ: Well, your Honor, the Step 1, if  
14 the first state does not escheat or their laws do not  
15 escheat that property, if they have an exception made  
16 for that property, then the second state has the  
17 authority to take that property because they have  
18 sovereign rights over the -- what the Courts have  
19 called -- the other party to the transportation.

20 THE COURT: Where anywhere in the law have you  
21 found something that supports that statement that the  
22 fact that a state has an escheat law, but has decided  
23 not to act on it or has decided to exempt a particular  
24 kind of property, now throws you into the second  
25 priority rule?

1 I don't know of any. And frankly if you read  
2 the American Express case, the Third Circuit opinion,  
3 put aside my own, you don't get there.

4 MR. PEITZ: Well, your Honor, it's the  
5 language of the Texas case. When they are determining  
6 what the first priority is, what the second priority  
7 is, and how you get to the second priority, they say  
8 if the first state does not escheat that property, you  
9 move to the second state --

10 THE COURT: They don't say that property. I  
11 think it's the fact that they don't escheat. At some  
12 period of time there were many states that didn't have  
13 escheat statutes. When those cases were decided,  
14 there were not 50 states with escheat statutes.  
15 That's a more modern concept that they've all done  
16 that now. So they were looking at if you are dealing  
17 with a state that does not have an escheat practice.

18 That's why you get the language in the Third  
19 Circuit. By the way, we are still on the Third  
20 Circuit. That's why you get the law in the Third  
21 Circuit that said the power to escheat is also the  
22 power to decide not to escheat. And what they are  
23 talking about is not to escheat a certain kind of  
24 property, not if you don't have an escheat statute.  
25 If you don't have an escheat statute, the Circuit

1 would agree, okay, now, you are open. You go to Step  
2 2.

3 MR. PEITZ: I believe the Third Circuit, your  
4 Honor, was discussing when the second priority state  
5 does not escheat, because in the cases, the American  
6 Express, New Jersey Retail Merchants was a question  
7 about whether or not a third priority --

8 THE COURT: You really ended up in the wrong  
9 place, didn't you, the Judge who decided those and  
10 wrote it? I think I kind of know what happened. So  
11 go ahead.

12 MR. PEITZ: I understand, your Honor.

13 The issue in that case was whether or not a  
14 third priority would be created which would take away  
15 from the second priority state authority to escheat or  
16 not escheat that property.

17 The state of first priority has the first shot  
18 to take that. But if they make the determination not  
19 to, the second state, because they still have  
20 sovereign rights over that company that's incorporated  
21 in New Jersey in this case, still have the authority  
22 over the sovereignty over that company to take that  
23 property since they are the other party to the  
24 transportation. They are the creditor state.

25 So if the debtor state makes that

1 determination, it doesn't take away from the second  
2 priority state's authority. It just simply allows  
3 that state to make that call.

4 The purpose behind saying that a state has the  
5 right not to escheat, the Court was saying, well,  
6 because states may want to bring companies into their  
7 state. They want to entice companies to come in  
8 because we don't escheat this property.

9 To have a state such as, I was going to say,  
10 Arizona that may not have that escheat statute that  
11 covers the property, there is no enticement to bring a  
12 company in if they decide not to as a state of last  
13 known address. That purpose only comes in for the  
14 state of incorporation because they want to entice a  
15 company to come into their state and say, if you come  
16 in here under the second priority, you won't have to  
17 turn it over.

18 That's what they were discussing. The states  
19 still have their sovereign rights over NFI. We are  
20 taking the property under the second priority because  
21 the Texas case did say, when the first state doesn't  
22 escheat the property, the property, they were very  
23 specific, and that's why I believe that the second  
24 state, in this case, New Jersey, still has the  
25 authority to take this property.

1 THE COURT: Let me hear from Ms. Green-Kelly.

2 MS. GREEN-KELLY: The problem with the  
3 argument is the Western Union v. Pennsylvania case  
4 which led to the priority rules, in Western Union  
5 there was a judgment by a Pennsylvania State Court  
6 against Western Union to escheat unclaimed money  
7 orders that had been sold in Pennsylvania.

8 The Supreme Court reversed that judgment  
9 because the Court said the Pennsylvania Court has no  
10 jurisdiction over other states that may claim it and  
11 the potential owners possibly exposing Western Union  
12 to multiple liability which would be a due process  
13 right violation.

14 In Texas v. New Jersey the Court starts out by  
15 saying, hey, the reason we are allowing original  
16 jurisdiction here is because we held in Western Union  
17 v. Pennsylvania that we would be exposing companies to  
18 multiple liability if everybody wasn't under the same  
19 jurisdiction of the Court to decide the rights.

20 The problem with what counsel is saying and  
21 New Jersey's position is, is that if New Jersey can  
22 take the property under the secondary rule, even  
23 though another state already has the priority  
24 authority, and the Third Circuit has said that that  
25 right, the primary rule right exists regardless of

1     what that state decides to do with it, as long as they  
2     have an escheat statute, you are ending up with a  
3     situation where what if the other state changes their  
4     law and now they are wanting the property back?

5             If there is a judgment in New Jersey asking  
6     NFI to send that property over to New Jersey, the  
7     other states, especially the ones that have B to B  
8     exemptions, they are not going to come to New Jersey  
9     and get it. But NFI is now having to escheat it to  
10    another state. It isn't consistent with the priority  
11    rules which are designed to bring the property to the  
12    state closest to the owner. The owner is in some  
13    other state and they are not looking in New Jersey for  
14    this property. It's not even consistent with the  
15    policies underlying the priority rules.

16            The bottom line is that the Texas v. New  
17    Jersey case makes clear, and your Honor is correct, at  
18    the time of Texas v. New Jersey in 1965 not all states  
19    had escheat statutes, and so the second prong of that  
20    secondary rule was designed to deal with that  
21    situation. But if property is supposed to escheat to  
22    the state closest to the owner, then it certainly  
23    couldn't possibly mean that it goes to New Jersey if  
24    the person is in Arizona.

25            In Arizona, for example, the statute is that

1 if it's a business-to-business transaction, the  
2 dormancy period is merely tolled. It's not even an  
3 exemption. It just says that the property doesn't  
4 become dormant until the parties stop engaging in a  
5 business-to-business relationship. So New Jersey is  
6 trying to take that property even though some day it  
7 may be escheatable to Arizona.

8 The bottom line is that the priority rules are  
9 substantive rules and the primary rule fails only if  
10 the holder lacks addresses, that's not the case here,  
11 and if the other state doesn't have an escheat  
12 statute, and that is not this case here.

13 THE COURT: I think the Third Circuit, Mr.  
14 Peitz, is very clear in its decision in talking about  
15 even though there may be potential windfall to the  
16 debtor. Here it would be NFI. There it was the FCC  
17 issuers. That's not the concern.

18 If you follow the trilogy of those three  
19 Supreme Court cases, the whole point was, we don't  
20 want to have different factual situations determining  
21 how things come out and having these kinds of  
22 arguments on a constant basis. So they made two  
23 priority rules that were very clear and we are  
24 supposed to be following them.

25 And you really do want to carve out another

1     niche of saying, okay, but if you've got an escheat  
2     statute, but the escheat statute is worded in a  
3     certain way that could exempt this property so that  
4     you have no interest in it, or you haven't actually  
5     taken any action, then we can step in.

6             There is no such carve-out that was created in  
7     those priority rules for those decisions by states  
8     that may decide if you are in a business-to-business  
9     relationship we are not going to collect from you.  
10    We'll have certain dormancy periods that may be  
11    different than yours. That they may do so because it  
12    remains under the first rule it is their right to  
13    escheat or not to escheat.

14            I do find, therefore, that on this issue as to  
15    dealing with out-of-state debtors, customers, whatever  
16    they are, payroll people, I don't know who they are at  
17    this point, for which last known addresses exist, then  
18    a likelihood of success has been established as to  
19    that area.

20            Now, let's talk about what else we've got here  
21    that doesn't fall within that. We've got apparently a  
22    category for which documents simply don't exist. Is  
23    that correct?

24            MR. PEITZ: Yes, your Honor.

25            THE COURT: No longer. As to those --

1 MS. GREEN-KELLY: Your Honor, can I address  
2 those?

3 THE COURT: Yes, please.

4 MS. GREEN-KELLY: So Delaware v. New York  
5 defined sort of expanded and said the priority rule is  
6 a three-step process. The first step is consistent  
7 with the derivative rights doctrine and it says first  
8 you have to identify the property, and the property is  
9 defined by whether there is a state law that has  
10 given -- and this is because it's intangible property,  
11 whether someone has the right and obligation, a  
12 property interest in being paid for something.

13 To the extent that the State is asserting that  
14 the amounts that they are estimating is property, that  
15 is contrary to the priority rules and is preempted.  
16 To the extent, however, that they are asserting it is  
17 a penalty for failure to keep records, then it is a  
18 penalty.

19 That will matter because we are going to be  
20 filing an amended complaint either today or tomorrow  
21 that will remove the state law claim, but will be  
22 replaced with a federal claim that will go to these  
23 issues. To the extent it is simply a penalty, then it  
24 is not unclaimed property and it isn't necessarily  
25 preempted by the priority rules.

1           So the real question -- and I've been having a  
2       discussion with counsel this morning. He says the  
3       estimate is an estimate of unclaimed property. In  
4       that case it's preempted.

5           MR. PEITZ: Your Honor, a couple of points.  
6       The first is that the state law at issue, what it says  
7       is, if you don't have records -- you are required to  
8       keep records. If you don't, we have to make a  
9       reasonable estimate of what the property is because we  
10      can't know. You don't have records.

11           They can't use it as both a sword and a shield  
12      to say, well, we don't have records. So you should  
13      presume that some of these are out of state. But at  
14      the same time we are not going to keep records, so,  
15      well, yeah, you can't do that either. They are trying  
16      to use it two different ways to get around the fact  
17      that they didn't keep records.

18           Whether or not this estimate includes  
19      property, whether it's something else, that is a state  
20      law issue. The state law says it has to be  
21      reasonable. That's going to be a determination by the  
22      State Courts because under the 11th Amendment they can  
23      only get a preliminary injunction for a violation of  
24      federal law. But the determination of what the amount  
25      is that's reasonable or not reasonable is a question

1 for the State Court to determine.

2 THE COURT: The problem I'm having here is,  
3 and dealing with this in the context of the priority  
4 rules we are discussing is, I know that there is major  
5 dispute as to how they came up with their estimate and  
6 what that is. And I know you are going to also argue  
7 whether you think it's a penalty, an estimate, or  
8 whatever, and there may be other due process arguments  
9 you want to make in that regard. That's not what I  
10 have today. That's the problem with that.

11 I don't know that I can adequately deal with  
12 this as a preemption of priority argument at this  
13 point without actually getting into how the estimates  
14 are being calculated and whether it's something that  
15 could be attacked at this stage or not. I really  
16 don't.

17 Because if you want to go back and say, and  
18 you think the method should be, while looking at the  
19 years surrounding that for which we have records,  
20 80 percent of them dealt with out-of-state and  
21 20 percent were in-state, or whatever, and you want to  
22 make that argument, I don't any basis to do that at  
23 this point and to say that's how they should go about  
24 doing it, and I don't know that you have any basis to  
25 determine that either.

1           This is one of those situations where,  
2       frankly, if there are no records, I don't even know  
3       what we are talking about by way of escheat of  
4       property, of intangible property, because we don't  
5       know that anything existed. But I understand the  
6       stature is written in an estimate.

7           I don't think today is my day to determine  
8       whether I can rule on what that means and whether it  
9       should be enjoined and I definitely will need more on  
10      that. So at this point I just don't feel that I can,  
11      that I have a likelihood of success as to how that's  
12      going to come out.

13           MS. GREEN-KELLY: And, your Honor, because we  
14      are going to be amending the complaint to add a due  
15      process claim concerning that issue.

16           THE COURT: I thought that's what I should  
17      have seen. I didn't have that argument and I didn't  
18      have it in the complaint.

19           MS. GREEN-KELLY: And I guess what I'd be  
20      asking since we will file that complaint today is  
21      whether we can also seek a preliminary injunction and  
22      brief that issue to be able to at least toll this  
23      until we can brief it on an expedited basis.

24           THE COURT: You don't really mean a  
25      preliminary injunction. What you are really asking is

1 the same way I did on the order to show cause and just  
2 to say that I restrain you until I can hear the  
3 argument on it.

4 MS. GREEN-KELLY: Yes.

5 MR. PEITZ: Your Honor, the amended complaint  
6 hasn't been filed yet.

7 THE COURT: I understand.

8 MR. PEITZ: I don't even know what they are  
9 really asking for until I see the amended complaint.

10 THE COURT: I understand.

11 MR. PEITZ: There may be an 11th Amendment  
12 problem with what they are asking for if it is really  
13 a state law issue.

14 THE COURT: I can't give you that until we see  
15 what the complaint looks like. Obviously, you are  
16 going to make your application with it.

17 Let me also tell you right now, I'm here  
18 today, tomorrow, and Friday, and I'm gone next week on  
19 vacation. So if you don't have it in by Friday, I'm  
20 not seeing it for another week.

21 MS. GREEN-KELLY: We will have it in today.

22 THE COURT: I'll wait and see it. I don't  
23 think they are going to be taking action today anyway.  
24 I can't deal with that issue until that's there. So  
25 at this moment I can't enjoin those estimates.

1           Now, let's get to the other factors of the  
2 preliminary injunction, in any event.

3           MR. PEITZ: Your Honor, I just want to say,  
4 since you had already found that on two of the  
5 plaintiff's claims they cannot get a preliminary  
6 injunction, if there is an injunction issued it should  
7 be a very narrow one just covering the alleged  
8 offending amounts and not the remaining parts of the  
9 assessment.

10          THE COURT: I think I knew that.

11          MR. PEITZ: Okay. I just wanted to be sure,  
12 your Honor.

13          THE COURT: It will be limited. I haven't  
14 gotten to the last factors.

15          MR. PEITZ: Yes, your Honor. I apologize.

16          THE COURT: Have a seat for a moment.

17                I think we can easily deal with those as well.  
18 And now we are only dealing with the assessments that  
19 relate to the out-of-state owners for whom last known  
20 addresses are known, whatever those categories may be,  
21 and that's the part we are looking to enjoin.

22                Now, on irreparable harm, the same argument is  
23 being made by the plaintiff as was made obviously in  
24 the American Express case which is based on sovereign  
25 immunity doctrines. You cannot bring suit to recover

1 these if you had to pay them currently.

2 Mr. Peitz, your arguments about that there's  
3 some process in the state by which you can object,  
4 frankly, some of this has already occurred. They  
5 would have to be defending the lawsuit, arguing it  
6 there, and if they lose at that level for whatever  
7 reason paying it over before I've had an opportunity  
8 to make the appropriate constitutional determinations,  
9 and they wouldn't be able to file a separate lawsuit.

10 That is not the kind of thing it's talking  
11 about. It's really the same exact argument as in the  
12 American Express case. So I can find irreparable harm  
13 because they would not be able to file a separate suit  
14 to recover.

15 Looking at the balancing of the harms here,  
16 essentially the State is saying, well, we don't have  
17 the use of this money. Argument could be made in  
18 every one of these cases and obviously I know what the  
19 harm is to the plaintiff.

20 Frankly, on this record similar to, as I said,  
21 the other escheat case that we decided, I would find  
22 that the factors were satisfied and provide a  
23 preliminary injunction only as to the category that I  
24 have identified at this time without seeing what else  
25 you might find and file.

1           So I think that resolves what we have today.  
2           Is that correct?

3           MR. PEITZ:   Just the issue of the bond, your  
4           Honor.

5           THE COURT:   I have the arguments.   A bond is  
6           appropriate in these cases.   It's the exception not to  
7           provide one.   One of the arguments being made  
8           obviously by the plaintiff was the argument that there  
9           really is not a monetary damage to the State.

10          I know that I did impose a bond in the  
11          American Express.   It was relatively a small amount.  
12          Frankly, I can't even remember what it was.

13          This is not going to be to post a bond for the  
14          full amount.   No, it's not.   And, frankly, I don't  
15          have any arguments that would indicate we are not  
16          going to find National Freight sometime in the future.  
17          They are a rather large company.   I don't even know  
18          now what the amounts are that we are talking about for  
19          the category for which I am granting the preliminary  
20          injunction.

21          What are the amounts?   Do we have any idea of  
22          what the entire amount is?

23          MS. GREEN-KELLY:   Well, your Honor, certainly  
24          the one that is about \$293,000 is entirely addressed  
25          property to other states.   The \$242,000 amount we are

1 going to have to go look at it, and also some of it  
2 has been paid already.

3 With respect to the credits, we have to go and  
4 look to see how much. But certainly a lot of their  
5 business is outside of New Jersey.

6 MR. PEITZ: Your Honor, very briefly.

7 The number that plaintiff's counsel is  
8 discussing is on Exhibit D to the Prashant Shah  
9 certification.

10 THE COURT: Just give me a basic idea what the  
11 numbers are.

12 MR. PEITZ: There is a column for items with  
13 address in exempt states, and also a column for items  
14 with address in conditionally exempt states. That  
15 amount is \$21,225.56 plus \$194. Those are the amounts  
16 where the addresses were known. There is also an  
17 amount for an estimated liability.

18 THE COURT: I'm not enjoining the estimated  
19 liability.

20 MR. PEITZ: Yes, I understand. But that's the  
21 other column.

22 So in this case, there is those amounts, plus  
23 statutory interest is continuing to accrue. This  
24 particular assessment was estimated through 2013. So  
25 it has been accruing a long time. So the amount of

1 the bond should be consistent with those amounts, plus  
2 interest.

3 THE COURT: What are the amounts?

4 MR. PEITZ: 21,000, plus statutory interest  
5 such as prime plus 10%. I'm not sure. I have to  
6 discuss with the client what that amount actually  
7 would be. I'm not prepared right now to specify what  
8 that amount would be.

9 THE COURT: I'm imposing a very, very modest  
10 bond in this case. Post a bond for \$10,000. The  
11 amounts are not great here, and I'm not concerned  
12 about whether in the end they will be able to pay.

13 With that, we'll enter a limited preliminary  
14 injunction order.

15 I would like to see counsel in chambers,  
16 please.

17 Thank you.

18 THE CLERK: All rise.

19 (Proceedings concluded.)  
20  
21  
22  
23  
24  
25

C E R T I F I C A T E

I, **Vincent Russoniello**, Official United States Court Reporter and Certified Court Reporter of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of the proceedings as taken stenographically by and before me at the time, place and on the date hereinbefore set forth.

I do further certify that I am neither a relative nor employee nor attorney nor counsel of any of the parties to this action, and that I am neither a relative nor employee of such attorney or counsel, and that I am not financially interested in this action.

S/Vincent Russoniello  
Vincent Russoniello, CCR  
Certificate No. 675

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